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Nos. 82-185, 82-246 and 82-259.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

NANCY B. BEECHER, ET AL.,
PETITIONERS,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Reply Brief for Petitioner, Boston Firefighters Union, Local 718.

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Introduction.

Respondents' brief concedes these salient points:

(1) The district court in both the police and fire cases made no findings of purposeful discrimination in certification and

recruitment procedures and even acknowledged its absence. Respondent's Brief, pp. 40 and 42;[1]

(2) The beneficiaries of the district court order suppressing the Massachusetts civil service seniority statute, Mass. Gen. Laws c. 31, § 39 were not victims of any certification (examination) or recruitment practice adjudicated to be discriminatory in impact. *Id.* at 12, 26, 46 *et seq.*[2]

(3) No challenge to the lawfulness of § 39 was offered and no claim that seniority based layoffs were illegal was made. *Id.* at 58; and brief in opposition to cert. at 16.

These admissions expose errors that are replete in the respondents' extensive contentions and in the points urged by their amici as this reply brief demonstrates.

Argument.

I. Respondents' Recurrent Theme that New Relief is Justified on Fourteenth Amendment Grounds Fails Because of Explicit Findings of No Purposeful Discrimination.

The certification (examination) and recruitment practices protested in the 1970 police case complaint and the 1972 private fire case complaint as violations of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983 were adjudicated as discriminatory in impact only and not purposeful. Decrees did improve minority access to both city departments in the ensuing decade and no attempt at a collateral attack on those early decrees is even suggested by petitioner, Local 718.

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[1] The First Circuit has been explicit that the only adjudicated violations were *not* intentional ones, *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (firefighters); *Castro* v. *Beecher*, 459 F.2d 725, 727 (1st Cir. 1972).

[2] *See also*, brief of respondents in opposition to petitioners for a writ of certiorari at 20. The First Circuit candidly acknowledges that layoff immunities were conferred on non-victims. 679 F.2d 975, 977.

After entry of the earlier decrees, decisions of this Court established that unintentional discrimination does not violate the Fourteenth Amendment (and hence does not violate §§ 1981 and 1983). *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 273-274 (1979); *Arlington Heights* v. *Metropolitan Housing Div. Corp.*, 429 U.S. 2[illegible] (1977); and *Washington* v. *Davis*, 426 U.S. 229 (1976). *Accord, General Bldg. Contractors Ass'n* v. *Pa.*, ___ U.S. ___, 102 S.Ct. 3141, 3149-3150 (1982). The present disputed order is built upon findings of violation now recognized as incorrect. Under these circumstances, this expansion of relief to further redress such improper Fourteenth Amendment findings was beyond the authority of the lower courts. The arguments in the brief of amici AFL-CIO and Public Employee Department, AFL-CIO at 2-4, in the brief of amicus Equal Employment Advisory Council at 10-14, and in the brief of amicus International Association of Fire Fighters, AFL-CIO at 10-12 establish that the lower courts had no authority on the basis of Fourteenth Amendment findings to so modify the earlier decrees. *See*, United States, Amicus Brief at 3 n.3 and Anti-Defamation League, Amicus Brief at 16-20.

Yet a recurrent theme in respondent's expanded brief and a predominate argument in their supporting *amici* filings is that the early 1970's findings of constitutional violations, now discredited, warrant new and further constitutional remedies in 1981, *e.g.*, Respondent's Brief at 19-29 and at 34. The plain fact is that intervening changes in law impeach any Fourteenth Amendment (and §§ 1981 and 1983) basis for a seniority suppression in 1981.

II. Employment Preference Remedies for Unconstitutional Exclusions Must be Limited to Relief Available Under Title VII.

Respondents consistently urge that racial *groups* can insist on preference remedies once unconstitutional discrimination is established (which is not the case here), *e.g.*, Respondent's Brief at 24-29. They argue that membership in the *group*

entitles all *group* members to the benefits of employment preferences. Their argument denies a fundamental constitutional principle. The Fourteenth Amendment confers rights upon individuals and not *groups*; it invests no *group* with special status. *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948). The principle is well stated thus:

> It is settled beyond question that the rights created by the first section of the Fourteenth Amendment, are by its terms guaranteed to the individual. If it is the individual who is entitled to judicial protection against classification based on his racial or ethic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently.

Regents of University of California v. *Bakke*, 438 U.S. 265, 301 (1978) (Opinion of Powell, J.).

Accord, *Connecticut* v. *Teal*, _____ U.S. _____, 102 S.Ct. 2525, 2534 ("The principal focus of [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole").

In any event, these are equal employment opportunities cases asserting Fourteenth Amendment claims pursuant to 42 U.S.C. §§ 1981 and 1983. When formulating remedies in such cases, 42 U.S.C. § 1988 instructs federal courts to act "in conformity with the laws of the United States" and such "law" includes § 703(h) and 706(g) of Title VII. *See*, Local 718's Brief at 15, 16.[3] *Note*, United States Constitution, Art. III, § 1.

Relief in §§ 1981 and 1983 litigation must take into account Congress's specific concern for and the special approval it accorded seniority systems in § 703(h) and the limits on judicial

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[3] Clearly Congress conferred immunity upon *bona fide* seniority systems and their applications in § 703(h); and it is absurd to contend that invocation of 42 U.S.C. §§ 1981 and 1983 renders such innocent seniority systems vulnerable to the suppression imposed in this case. *See*, *Setser* v. *Novack, Inv. Co.*, 657 F.2d 962, 966-967 (8th Cir. 1981) (*see also*, Local 718's Brief at 16 and notes).

remedies Congress imposed in § 706(g), discussed in Part III *infra* at III.[4] Neither respondents nor their amici discuss the congruence between remedies under Title VII and remedies under §§ 1981 and 1983 that 42 U.S.C. § 1988 imposes in civil rights employment litigation.

III. Respondents Misapprehend the Terms and Legislative History of §§ 703(h) and 706(g) and the Relevant Decisions of this Court.

1. Respondents contend, at 58-62, that Local 718's reliance upon § 703(h) is misplaced, because § 703(h) is a substantive provision defining the scope of permissible conduct and is not a remedial provision. That contention rests on respondents' reading of *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1977). But *Franks* does not, as respondents contend, preclude consideration of the congressional intent to protect seniority stated in § 703(h) when it comes to the shaping of relief under the Act's remedial provision, § 706(g).

In *Franks*, *supra*, the plaintiffs were identifiable victims of post-Act hiring discrimination who sought merely their "rightful place": the place *in the seniority system* that the plaintiffs would have occupied but for the employer's discriminatory refusal to hire them. The court held that the congressional desire to protect seniority did not preclude that particular relief and in so doing stated:

> Petitioners do not ask for modification or elimination of the existing seniority system, but only for an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire. *It is this context that must shape our determination as to the meaning and effect of § 703(h).* 424 U.S. at 758, emphasis added.

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[4] Likewise relief in civil rights act litigation must be limited by the congressional hostility to governmentally imposed quotas expressed in § 703(j).

In contrast to the relief sought in *Franks*, the relief ordered in the instant case *does* constitute a "modification . . . of the existing seniority system." The challenged order here provides that persons who were *not* "victims of illegal discrimination" are able to retain employment in preference to persons who have committed no wrong and who have superior seniority claims to that employment. Post-*Franks* decisions of this Court make clear that the *Franks* holding does not preclude consideration of the values underlying § 703(h) in determining relief pursuant to § 706(g). *See infra*, at 7, 8. When those values are considered, it follows that § 706(g) does *not* allow the courts to provide racial preferences to non-victims that override seniority rights of incumbent employees.

Section 706(g) authorizes "appropriate" remedies, and "the scope of a district court's remedial powers under Title VII is determined by the purposes of the Act." *Teamsters* v. *United States*, 431 U.S. 324, 364 (1977).[5] Thus those purposes, to the extent that they are expressed in § 703(h), must be taken into account in framing appropriate remedies: § 703(h) is a reflection of Congress' specific intention that the Act not interfere with innocently motivated seniority systems.[6]

Opponents of Title VII, during the debates, pointed to the bill's silence respecting seniority systems as leaving at least ambiguous "Title VII's *impact on* existing collective bargained seniority rights," *id.* at 352 (emphasis added), and had predicted that the bill would "destroy" such rights, *id.* at 350. That warning led to an outpouring of responses from the bill's sponsors, quoted in *American Tobacco Co.* v. *Patterson*, ___ U.S. ___, 102 S.Ct. 1534, 1539-1540 (1982), that "the bill would not affect seniority at all;" "Title VII would have no effect on seniority rights existing at the time it takes effect;" Title

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[5] *See also, Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770-771 (1977).

[6] *See also, Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 81 (1977); *American Tobacco Co.* v. *Patterson*, ___ U.S. ___, 102 S.Ct. 1534, 1539-1541 (1982).

VII would "have no effect on established seniority rights;" "seniority rights are in no way affected by the bill." As this Court has recognized, the sponsors' intent was that the bill would "protect . . . seniority systems," *id.*, 102 S.Ct. at 1540. Section 703(h) was added to confirm that intention, and the sponsors' statements following its addition to the bill "are to the effect that 'the Senate substitute bill expressly protects valid seniority systems'", *id.*[7]

The Congressional decision not to disturb the seniority status earned by employees except to the minimum extent necessary to vindicate rights of actual victims to rightful place within a seniority system, *Teamsters*, *supra*, 431 U.S. at 353-356, 371, is frustrated when earned seniority rights are subject to indiscriminate nullification just as surely as that decision would be thwarted by direct invalidation of seniority rights, as a Title VII violation, because of the impact of *bona fide* of seniority applications.

This Court's post-*Franks* seniority decisions confirm this view. In *Teamsters* v. *United States*, *supra*, the court therefore held that *only* those non-applicants who could prove that they would have applied for jobs but for the employer's discriminatory policy, *i.e.*, who "were *actual* victims of the company's discriminatory practices," 431 U.S. at 371-372, could be afforded retroactive seniority relief. More recently, in *American Tobacco*, the court re-emphasized that rightful place relief for victims is the limit of the inroad upon protection of seniority rights permitted at the remedy stage:

> Title VII does affect seniority rights, for *Franks* v. *Bowman Transportation Co.*, *supra*, allows awards of retroactive seniority *to victims of unlawful discrimination*. However, Senator Clark . . . and other key proponents of the bill *intended that it have minimal im-*

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[7] *See*, United States' Brief at 13-22 and Equal Employment Advisory Council's Brief at 17-23.

pact on seniority systems. 102 S.Ct. at 1540 n.15, emphasis added.[8]

On this point, this case is analytically indistinguishable from *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). The Court dealt there with the relationship between § 8(d) of the NLRA, which states that an employer does not violate his duty to bargain by refusing to agree to a union proposal, and § 10(c), which empowers the NLRB to provide such affirmative remedies against violators "as will effectuate the purposes of the Act." The Court of Appeals, noting that § 8(d) is phrased in terms of violation, held that it did not preclude the Board from directing an employer to agree to a union proposal as a remedy for violations independently found. This Court rejected that reasoning:

> In reaching this conclusion the Court of Appeals held that § 8(d) did not forbid the Board from compelling agreement. That court felt that "[s]ection 8(d) defines collective bargaining and relates to a determination of *whether* a . . . violation has occurred and not to the *scope* of the remedy which may be necessary to cure violations which have already occurred." 128 U.S. App. D.C., at 348, 389 F.2d at 299. We may agree with the Court of

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[8] In *Ford Motor Co.* v. *E.E.O.C.*, ___ U.S. ___, 102 S.Ct. 3057 (1982), this Court rejected — as inconsistent with the remedial objectives of Title VII — the E.E.O.C.'s position that in order to toll the accrual of backpay an employer must not only offer reinstatement to one who claims to be a victim but must offer retroactive seniority as well. Recognizing that such a rule could lead to conferring retroactive seniority upon persons who ultimately were found not to be identifiable victims of discrimination, the court declared: "The rule . . . threatens the interests of other, innocent employees by disrupting the established seniority hierarchy, with the attendant risk that an innocent employee will be unfairly laid off or disadvantaged because a Title VII claimant unfairly has been granted seniority." 102 S.Ct. at 3070. *Accord*, *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 915, 102 S.Ct. 1127, 1136 (1982) (class-based seniority relief for identifiable victims is appropriate under § 706(g)).

> Appeals that as a matter of strict, literal interpretation that section refers only to deciding when a violation has occurred, but we do not agree that that observation justifies the conclusion that the remedial powers of the Board are not also limited by the same considerations that led Congress to enact § 8(d). It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. It would be anomalous indeed to hold that while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute. 397 U.S. at 107-108 (emphasis in original).

The *H.K. Porter Co.* analysis is particularly apposite, for § 10(c), there construed, was the model for Title VII's remedial provision, § 706(g). *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 419. Accord, *Ford Motor Co.*, v. *E.E.O.C.*, ___ U.S. ___, 102 S. Ct. 3057, 3062 n.8 (1982). Thus, while § 703(h) of Title VII, like § 8(d) of the NLRA, speaks to whether a violation has occurred, both provisions express a congressional policy which must preclude the fashioning of remedies inconsistent with that policy.[9]

While the congressional desire to protect seniority rights alone indicates that the *particular* quota remedy sought here would not be "appropriate" (as the remedy would modify a bona fide seniority system), there is independent evidence that Congress did not intend to authorize quota remedies under *any* circumstances (even where such remedies would not modify a seniority system). That evidence is set forth in the

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[9] The foregoing analysis also demonstrates respondents' error (at 51 n.9) in contending that the congressional hostility to governmentally-imposed quotas, reflected in § 703(j), has no relevance to determining appropriate remedies under § 706(g).

Amicus Curiae Brief of the AFL-CIO at 8-12. Note also, United States' Brief at 21-24. As respondents and amicus National Education Association (NEA) attempt to show the opposite, Local 718 takes this opportunity to respond.

Respondents and NEA offer no serious argument that the Congress that enacted Title VII in 1964 intended to empower courts to order racial quotas as "relief" in Title VII cases. Indeed, neither respondents nor the NEA dispute the showing that the 1964 Congress intended to deny the courts the power to grant such relief.[10] Rather, respondents and NEA contend that the 1972 Congress reversed the 1964 decision forbidding court-ordered quotas. Two arguments are advanced in support of this contention.

First, it is suggested that the addition to the first sentence of § 706(g) of the phrases "but is not limited to" and "or any other equitable relief as the court deems appropriate," should be read as authorizing courts to order racial quotas. Respondents' Brief at 53; NEA's Brief at 23-24. But neither respondents nor NEA point to a single word in the legislative history suggesting that this change was intended to permit court-ordered quotas. Indeed, the sole explanation of § 706(g), as amended, which is contained in the section-by-section analysis prepared by Senators Williams and Javits (118 Cong. Rec.

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[10] The AFL-CIO's Brief sets forth a series of unequivocal statements by the floor leaders of the Civil Rights Act of 1964 and a number of other supporters of the bill in both houses of Congress that Title VII does not empower courts to order racial quotas or preferences. AFL-CIO's Brief at 8-12. In the face of that demonstration, respondents nevertheless contend that: "The legislative history of the 1964 Civil Rights Act . . . reveals little specific consideration of the remedial powers of the federal courts." Respondents' Brief at 49 n.8. And the NEA, while acknowledging that "[t]here are statements in the legislative history of the 1964 Act that indicate an intention to bar the preferential hiring requirements even as a remedy for a proven violation," suggests that these statements by the sponsors of the Act should be ignored "in favor of constructions . . . more in keeping with the overall policy and purpose of the Act." NEA Brief at 20-21 n.12. But the statements of the Act's sponsors reflect what Congress intended to enact into law. And Congress' intent defines "the overall policy and purpose of the Act."

7166, 7168), states quite a different understanding of "appropriate relief":

> [T]he scope of relief under [§ 706(g)] of the Act is intended to make the *victims of unlawful discrimination whole*, and . . . the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice* be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. (Emphasis added.)

See also, Franks v. *Bowman Transportation Co.*, 424 U.S. 747, 764 n.21, where this Court explained that the "added phrase speaking to 'other equitable relief' in § 706(g) . . . indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder."

It is also significant that the 1972 Congress did not amend the last sentence of § 706(g). Respondents (at 54-58) and the NEA (at 18-19) dismiss the last sentence of § 706(g) as irrelevant. Both contend that the sentence merely denies relief to those who were actually turned down for non-discriminatory reasons, and is inapplicable to those who, because they never applied, were never turned down. Yet the principal sponsors of the 1964 Act pointed to that sentence as the textual proof that the bill did not permit court ordered quotas.[11] Since the 1972 Congress did not amend the last sentence, and the intent of the 1964 Congress is unmistakable, it is that 1964 intent that controls. *Teamsters*, 431 U.S. at 354 n.39.

Second, lacking any basis in what Congress did and said for the argument that the 1972 Congress intended to legislate a reversal of its 1964 prohibition on court-ordered quotas, respondents and NEA contend that such a reversal was accomplished *sub silentio*. Respondents and NEA claim that at the

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[11] See AFL-CIO's Brief at 9-10, 11.

time the 1972 amendments were enacted there were judicial decisions upholding the use of court-ordered quotas. Respondents's Brief at 40; NEA's Brief at 21. They argue that these decisions, despite their inconsistency with the intent of the 1964 Congress, became the expression of the 1972 congressional will by virtue of a general statement made in the introduction to the section-by-section analysis cited above (118 Cong. Rec. at 7166). The full text of that introduction is as follows:

> This analysis explains the major provision of H.R. 1746, the Equal Employment Opportunity Act of 1972, as agreed to by the Conference Committee of the House and Senate on February 29, 1972. The explanation reflects the enforcement provisions of Title VII, as amended by the procedural and jurisdiction provisions of H.R. 1746, recommended by the Conference Committee.
>
> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Respondents and NEA err in this contention for the following reasons:

(a) This general statement is by its terms inapplicable to the construction of § 706(g). For Congress in its addition to the first sentence of § 706(g) "address[ed] itself" to the question of the appropriate remedy under Title VII. And, as discussed above, the section-by-section analysis itself "indicate[s]" the "intention" that "'rightful place' was the intended objective of Title VII and the relief accorded thereunder." (*Franks*, *supra*, 424 U.S. at 764 n.21.) In light of the 1964 Congress' clearly expressed purpose to bar court-ordered quotas, and the specific statement of the 1972 Congress in the section-by-section analysis as to the remedial objectives of § 706(g) (quoted *supra* at 11), the general introductory statement

would not constitute a congressional authorization of court-ordered quotas even if the lower-court decisions cited by respondents and NEA could be read as expressing a judicial consensus as of 1972 that Title VII permitted such quotas (and they should not be so read, *infra* at 15-7).

(b) It is basic that the concurrence of both houses of Congress is required to amend existing legislation. Congress cannot be deemed to have incorporated into a statute judicial interpretations of that statute when it is clear that either house of Congress understood and intended to retain the statute's original meaning. Matters then stand on the same footing when the statute reaches this Court for a definitive interpretation as if no amendment had occurred: there having been no agreement in a subsequent Congress to change the law, the intent of the Congress that enacted the statute originally continues to govern. *Accord*, *Teamsters*, *supra*, 431 U.S. at 354 n.39 ("It is the intent of the Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls").

Here the House of Representatives, in the course of enacting the 1972 amendments to Title VII, made manifest its understanding that Title VII as it stood did not *and as amended* would not authorize court-ordered quotas.[12] Thus, no matter what the lower court law at that time showed, the House in 1972 legislated on the understanding that Title VII does not

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[12] See the extensive materials cited in the AFL-CIO's Brief at 16-22. Notwithstanding that showing, the NEA's Brief at 27 n.14, states: "There were no discussions on the floor of the House of Representatives of preferential remedies under Title VII." The NEA goes on to suggest that the will of the House is to be inferred from "the failure of the House to prohibit racial preferences under the Executive Order. . . ." *Id.* Again, the NEA's brief simply ignores the statements in the House distinguishing between the power of the OFCC to require racial preferences under the Executive Order and the power of courts to order such preferences under Title VII. *See*, AFL-CIO's Brief at 16-22; see particularly *id.* at 19-20. Similarly, respondents' brief ignores all of the pertinent legislative history in the House in 1972, citing instead to materials that do not address the issue of court-ordered quotas.

permit such quotas, and that understanding, which tracks the 1964 Congress' intent, governs interpretation of the Act.[13]

(c) Putting aside the House of Representatives' understanding in 1972 that court-imposed quota remedies are not available under Title VII, the cases, on which respondents and NEA rely, do not, as is claimed, constitute any uniform judicial endorsement of court-ordered quotas. For the proposition that "[p]rior to the passage of the 1972 act, Title VII had been held to authorize affirmative, non-victim specific relief," Respondents' Brief at 49, relies on *United States* v. *Ironworkers Local 86*, 315 F. Supp. 1202, 1247-1248 (W.D. Wash. 1970), *aff'd*, 443 F.2d 544, 553-554 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *United States* v. *Sheet Metal Workers Local 36*, 416 F.2d 123, 132-133 (8th Cir. 1969); *Local 53, Asbestos Workers* v. *Vogler*, 407 F.2d 1047, 1055 (5th Cir. 1969); *United States* v. *Local 38, IBEW*, 428 F.2d 144, 149-151 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).[14]

Each case cited by respondents was decided prior to *Griggs* v. *Duke Power Co.*, 402 U.S. 414, 430 (1971) (Title VII applies to "practices . . . neutral on their face . . . [which] operate to 'freeze' the status quo of prior discriminatory practices." The central issue in three cases was whether a court

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[13] While the intent of the House not to change the ban on court-ordered quotas enacted in 1964 is conclusive by itself, it is significant that in the Senate did not manifest a contrary intention. Respondents and the NEA point to statements made by Senators Javits and Williams in connection with one of the multitude of amendments submitted by Senator Ervin in the course of his filibuster. As is shown inthe AFL-CIO's Brief at 22-25, neither those statements, nor the vote on the amendment, can be taken as an expression by the Senate of its understanding of the current law respecting court-ordered quotas or of its intention to reverse the decision made in the 1964 Congress respecting quota remedies. The other materials from the Senate cited by respondents and the NEA do not even pertain to the question of court-ordered quotas.

[14] Amicus NEA advances the same contention, citing the same four cases and *United States* v. *Central Motor Lines, Inc.*, 325 F. Supp. 478 (W.D.N.C. 1970). NEA's Brief at 21. *Central Motor Lines* is simply a two page preliminary injunction and contains no legal ana' '.

could enjoin facially neutral practices (prior experience requirements or a nepotism rule) which perpetuated the effects of prior discrimination over opposition that the injunctions would to accord preferential treatment in violation of § 703(j) (experience requirements, *Sheet Metal Workers, supra, Local 38, IBEW, supra* and nepotism, *Vogler, supra*).

Neither *Sheet Metal Workers, supra* nor *Local 38, IBEW, supra* concerned "preferences" or "quotas" as those terms are now used. Indeed, the Eighth Circuit, in holding that an injunction banning an experience requirement did not violate § 703(j), made this disavowal: "In requiring the modifications, we impose no quotas, we grant no preferences." Its very next paragraph is introduced thusly: "[N]or do we deprive any non-Negro craftsman of bona fide seniority rights.[20]" That note 20 acknowledges that *bona fide* seniority systems are entitled to protection under Title VII by virtue of § 703(h).[15]

Vogler, supra, upheld an injunction striking down nepotism and prior experience as membership requirements and "ordered the development of objective membership criteria," 407 F.2d at 1051, not racial quotas or preferences, to govern future union membership admissions. Pending development of such objective criteria, the injunction prohibited new admissions of members (save identified discriminates) and directed continuance of chronological referrals for work, with alternating white and Negro referrals, *id.* In a brief cryptic passage near the end of its opinion, the Fifth Circuit simply states pending that development alternating referrals were required for "administrative reasons," *id.* at 1055.

The Ninth Circuit sustained an injunction in *Ironworkers, supra*, that contained compulsory numerical guidelines for

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[15] A leading law review note published in 1971 observed with respect to the remedy prescribed in *Sheet Metal Workers* that: "The principle of color blindness is maintained . . . . There was to be no unfairness to whites." But it emphasized that it called for no preferences, no quotas. Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L.Rev. 1109, 1147 (1971) (footnotes omitted).

minority admissions into apprentice programs against arguments that the injunctions violated § 703(j). The Ninth Circuit noted (and it was not presented with any seniority issues) the "only statutory limitation on the availability of [court-ordered] relief is the anti-preferential treatment provision of section 703(j)." 443 F.2d at 553. The Ninth Circuit, relying on *Vogler, supra*, rejected the appellant's contentions as to § 703(j) and states that the district's court's affirmative relief "did not establish a system of racial quotas or 'preferences' in violation of section 703(j). 443 F.2d at 554.

Thus while close reading of *Vogler* and *Ironworkers* reveals that orders establishing racial preferences were approved, neither case endorsed Court ordered racial quotas in Title VII cases as such.[16]

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[16] Amicus NEA notes that some of these four decisions were cited and/or published in the legislative materials. NEA's Brief at 22, 26. But the only NEA cited item in which the meaning of these cases with respect to the issue of race-conscious remedies was discussed was the statement of Senator Javits at Leg. Hist. 1048. There Senator Javits described the *Ironworkers* case as one holding "that there was an affirmative duty for minority recruitment"; and he referred to a "decision . . . by Judge Bonsal in New York, in the Steamfitters case, [where] an affirmative order was actually entered requiring a union local to take in a given number of minority-group apprentices". *Id.* But, Judge Bonsal had ordered that 169 minority steamfitters who were members of "Branch B" of a local union, who were "doing the same kind of work as members of the A branch" and who were "on the whole . . . as competent as A men", were entitled to be admitted into membership in the A branch. *United States* v. *Local 638, Steamfitters*, 337 F. Supp. 217, 219-220 (S.D.N.Y. Jan. 3, 1972). As to other potential candidates for membership, the order simply provided that the union "shall submit to the Court proposed objective qualifications and procedures . . . for admission of workers, regardless of race or national origin, to full journeyman status in the A Branch. . . ." *Id.* at 221. Senator Javits' vague description of the *Ironworkers* case, coupled with his reference to the *Local 638 Steamfitters* case which involved no racial preferences, hardly communicates the view that the decisional law was understood by Senator Javits, let alone the entire Senate, to permit court-ordered quotas under Title VII are permissible.

NEA also makes much of the decision in *Contractors Association* v. *Schultz*, 442 F.2d 159, 172 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), upholding the Philadelphia Plan established pursuant to Executive Order 11246. See NEA's Brief at 21-22, 26. But as NEA acknowledges, that case

In short, as of 1972, the lower court law with respect to the permissibility of court-ordered quotas in Title VII cases was in an early and disorderly stage of development. The existing decisional law did not establish a clear rule that could justify an inference that the 1972 Congress, without ever expressly stating so, reversed the judgment made in the 1964 Congress not to authorize such quotas under Title VII especially considering the 1972 legislative materials and history.

IV. The Matter is Not Moot.

The August 7, 1981 order states at its fourth paragraph, (Petition For Writ of Certiorari, Local 718, at A29):

> In the event that a firefighter's appeal of his termination to the defendant members of the Massachusetts Civil Service Commission challenges the method of termination set forth herein, the defendant members of the Civil Service are hereby restrained and enjoined from disapproving, invalidating or interfering with the termination on that basis.

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merely held "that Section 703(j) was a limitation only on what could and could not be required under Title VII," rather than under the Executive Order. NEA's Brief at 21. See 442 F.2d at 172.

Finally, it is worth noting as well that as of 1972 other authorities looked in the opposite direction. Indeed, in the police case now before the Court, Judge Wyzanski had refused to grant a remedy embodying racial preferences, stating:

> [T]his court declines to follow plaintiffs' proposals for preferential hiring of these plaintiffs or other black and Spanish-surnamed persons. Quite apart from such constitutional problems as would be presented . . ., this court sees no reason to put blacks, for example, ahead of Indians, or Chinese, or whites who are in a comparable plight.

Castro v. *Beecher*, 334 F. Supp. 930, 945 (D. Mass. 1971). Judge Wyzanski's decision had not been reviewed by the Court of Appeals at the time Congress acted in 1972. *Accord*, *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971) (§§ 1981 and 1983 action; minority preferences are proscribed racial discrimination).

Senior firefighters' appeals to the Civil Service Commission (CSC) are still pending, Under the orders explicit terms, CSC cannot "disapprov[e]" or "invalidat[e]" their terminations on statutory seniority grounds. Instead, in the CSC proceedings and in any ensuing appeals, the city of Boston can contest the firefighters' seniority claims on the ground that a valid federal order set aside their seniority. Senior firefighter back pay claims are forestalled unless the federal order is reversed. Such collateral legal consequences disadvantaging senior firefighters justify this Court's addressing the merits. *Sibron* v. *New York*, 392 U.S. 40, 54-56 (1968). *See*, United States' Brief at 9 n.8.

Enactment of 1982 Mass. Acts, c. 190, § 25, reproduced at Respondent's Brief, App. A., does not moot this case. Although that omnibus bill directed reinstatement of available officers and protects them from termination again only "for lack of funds," the reinstated officers are still vulnerable to layoffs for other reasons such as departmental reorganization and reduced manpower needs, contrary to respondents' assertions at 65. The minimum staffing levels stated in § 25 expire on June 30, 1983 and in any event newly hired officers in both departments (Respondent's Brief at 14), are exposed to fiscally based layoffs. "Proposition 2 1/2", the tax limitation initiative, 1980 Mass. Acts, c. 580, has continuing effect. Petition For Certiorari, No. 82-259, at 29 n.9. In light of ongoing economic and fiscal concerns, no "assurance that 'there is no reasonable expectation . . .'" of recurrence exists[17] and the 1982 statutory reinstatements and terms are neither "interim relief or events [that] completely and irrevocably eradicated the effects . . ." of the August 7, 1981 order. *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979).

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[17] The omnibus legislation, at its § 30, authorized a "user fee" to cover the costs of "augmented fire service" and to "assure [Boston's] continued ability to provide" such service. This specific "user fee" has been found unconstitutional by the Massachusetts Superior Court Department and its enforcement is subject to an injunction. Hence millions of dollars of expected revenues from this source are in doubt. The Boston Globe, April 2, 1983, p.13.

The complaints and many earlier decrees in both the fire and police cases were state wide in scope. The tax limitation initiative and its continued operation can lead to layoffs in other cities subject to the seniority statute and the court orders, and in this way, this dispute as to the lawfulness of court orders that surpress a valid seniority statute is fully "capable of repetition" while evading review unless this Court addresses the merits. *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 547 (1976).

The legality of a seniority suppression to maintain minority hiring gains pursuant to federal court orders in an important issue of substantial public interest. The real possibility, if not inevitability, of future orders impacting on CSC and on Boston public safety personnel, "militates against a mootness conclusion." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

Any deposition that fails to address the merits of the issues leaves the court's decision below as a "pertinent statement of the governing law, even if that decision is not directly binding.[10]" *County of Los Angeles, supra* at 646 (opinion of Powell, J. dissenting) (note 10 points out that unless the views of the court below on merits are reversed, these views are "persuasive authority if not the governing law" in the circuit).

Respondents and their amici have not satisfied their "heavy" burden. *W.T. Grant Co., supra* 345 U.S. at 633, in their mootness contentions.

Conclusion.

For the reasons set forth above and in Local 718's opening brief, the decision and judgment of the First Circuit should be reversed with directions that judgment be entered denying plaintiff's motion to modify prior remedial orders.

Respectfully submitted,

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